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Nos. 90-344 and 90-367

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TRANSWESTERN PIPELINE COMPANY,
Petitioner,
v.
KANSAS POWER AND LIGHT COMPANY, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
PUBLIC UTILITIES COMMISSION OF CALIFORNIA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF TRANSWESTERN PIPELINE COMPANY

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RULE 29.1 STATEMENT

The listing of Petitioner Transwestern Pipeline Company's parent company and its subsidiaries was provided on pages iii-ix of the petition for a writ of certiorari in No. 90-344. The following companies should be added to the list of subsidiaries of Enron Corp.:

Enron Gas Liquids Holding B.V. (The Netherlands)

Enron Gas Liquids B.V. (The Netherlands)
Loga Chemicals B.V. (The Netherlands)

Enron Argentina, S.A. (Argentina)
Enron Milford, Inc. (Delaware)
Enron Power Operations Limited (England)
Enron Power Construction Limited (England)
Teeside Power Limited (United Kingdom)
Enron Storage Company (Delaware)
Enron Gas Processing (U.K.) Limited (United Kingdom)

The following entities should be added to the list of joint ventures of Enron Corp.:

Bannon International Limited (Liberia)

Owned by Enron Gas Liquids, Inc.—50%
Subsidiaries:

Mundogas Shipping Ltd. (Liberia)

Mundogas America Limited (Liberia)
Mundogas Europe Limited (Liberia)
Mundogas Orinoco Limited (Liberia)
Mundogas Pacific Limited (Liberia)
Mundogas Transportation Limited (England)

Enron Arbross Ship Management Co. Ltd. (Hong Kong)

Owned by Enron Gas Liquids, Inc.—50%

Halton International Limited (Liberia)

Owned by Enron Gas Liquids, Inc.—50%
Subsidiaries:

Mundogas (Storage) Inc. (Liberia)
Mundogas (UK) Ltd. (England)
Mundogas Limited (Liberia)
Mundogas Services Limited (Liberia)
Mundogas Trading Limited (Liberia)

Tarumi Enterprises Ltd. (Liberia)

Owned by Enron Gas Liquids, Inc.—50%
Subsidiaries:

Veldmoor International Limited (Liberia)
Weddell Corporation (Liberia)

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REPLY BRIEF OF TRANSWESTERN PIPELINE COMPANY

INTRODUCTION

Transwestern Pipeline Company ("Transwestern") hereby replies to the briefs in opposition filed by the Process Gas Consumers Group ("PGC") and the Kansas Power and Light Company ("KP&L") jointly with the Public Utilities Commission of the State of California ("CPUC") on October 9, 1990.

SUMMARY OF ARGUMENT

Respondents' briefs in opposition confirm that the questions presented by the petitions for a writ of certiorari are worthy of review. Respondents fail to reconcile the standards of *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) (*"Chevron"*) with the lower court's substitution of its own narrow and inflexible "notice" interpretation for the Federal Energy Regulatory Commission's ("FERC") interpretation of what constitutes acceptable "notice" under Section 4(d) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c(d), and with the limits placed by the lower court on the scope of FERC's waiver authority under the same statutory provision. Transwestern submits that *Chevron* requires deference to FERC's attempt to interpret the statute it has been empowered to administer by Congress. The lower court's decision does not grant such deference to FERC.

Respondents have likewise failed to reconcile the conflict inherent between the lower court's decision and the Congressional mandate reflected in Title VI of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§ 3431, *et seq.*, regarding a pipeline's right, under certain circumstances, to recovery of gas costs. Given their resulting inability to defend this conflict as lawfully permissible, respondents assert that Transwestern is seeking a recovery right beyond the express terms of the NGPA. Such is not the case. All Transwestern seeks is the right expressly pro-

vided by the NGPA and NGA—the right to seek recovery from its sales customers of purchased gas costs.

Respondents suggest that the Court's recent decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), ("*Maislin*") supports the lower court's decision. As this Court is well aware, however, *Maislin* did not involve either review of a lower court decision which imposed a notice date different from that imposed by the agency, or review of an agency interpretation of the scope of its waiver authority.

Finally, PGC urges that this Court deny the petitions because "this case involves a minor, isolated matter of no practical significance." PGC Brief at 4. As indicated in the "Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae on Behalf of the Interstate Natural Gas Association of America in Support of Petitioners", filed October 9, 1990, nothing could be further from the truth. For five years now FERC has grappled with the consequences of its efforts to increase competition within the natural gas industry. FERC's orders reviewed below are an outgrowth of the major policy initiatives FERC enunciated in its Order Nos. 436, 451 and 500, and represent FERC's initial efforts under its Order No. 500 gas inventory charge policies to provide "open-access" transportation without a build-up of future take-or-pay. Such issues are not trivial—either in the magnitude of dollars at stake for the natural gas industry or in the direction the industry will take in responding to the combination of future market and regulatory forces.

ARGUMENT

A. The Lower Court Erred In Substituting Its Statutory Interpretation For That Of The FERC

The court below disallowed Transwestern's collection of purchased gas costs based upon the court's interpretation of the "filed rate" doctrine. According to the lower court, the "notice" afforded to Transwestern's customers through FERC regulations and Transwestern's tariff

(and found by FERC to satisfy the NGA Section 4(d) requirement for purposes of assessing cost responsibility for deferred gas costs) was inadequate under the "filed rate" doctrine. The rejection of FERC's notice findings, in favor of the court's own determination of what constituted adequate NGA Section 4(d) notice, was endorsed by both briefs in opposition as consistent with the principles of *Chevron*.

Arguments concerning this asserted notice defect and, ergo, the alleged failure of FERC to properly interpret the "filed rate" doctrine, quickly unravel when considered in the context of the regulatory and statutory system in place for recovery of purchased gas costs and the teachings of *Chevron*. As to the regulatory scheme, Transwestern's tariff—like that of most other interstate pipelines—permitted refunds to (or collection from) jurisdictional sales customers of past period overrecovered (or underrecovered) purchased gas costs by way of incremental credits (or surcharges) on projected jurisdictional sales. This crediting/surcharge mechanism (which is an integral component of the purchased gas adjustment ("PGA") clause implemented in 1972) was designed to keep both a pipeline and its sales customers whole with respect to the gas cost component of a pipeline's rates, and was necessary because of the errors inherent in the method by which this cost component is derived—*i.e.* based upon estimates of the levels and costs of expected purchases and estimates of projected sales.

Moreover, the method by which Transwestern is to recover the purchased gas costs in question arose (and was approved) not as a result of an NGA Section 4 tariff filing, but rather in the context of (1) the termination of Transwestern's jurisdictional sales services on behalf of its two principal customers, (2) the concomitant initiation of firm transportation-only services for one of those customers,[1] and (3) the termination of Transwestern's

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[1] The other sales customer elected to leave Transwestern's system entirely.

PGA tariff clause. *See Transwestern Pipeline Co.*, 43 F.E.R.C. ¶ 61,240, *reh'g granted in part and clarified*, 44 F.E.R.C. ¶ 61,164 (1988), App. 55a-127a. Accordingly, in the orders reviewed by the lower court, FERC quite correctly found that its PGA regulations in this regard, and Transwestern's tariff provisions implemented pursuant to these regulations, provided adequate notice to Transwestern's two principal sales customers that they would remain responsible for all purchased gas costs previously incurred by Transwestern and which remained unrecovered upon termination of the underlying sales services and the PGA clause itself. 44 F.E.R.C. at 61,537, App. 113a.

The arguments of PGC and KP&L/CPUC notwithstanding, the adequacy of notice analysis does indeed invoke the *Chevron* standards for review of agency action. Whether framed in terms of adequacy, timing, or otherwise, the findings of FERC rested upon its interpretation of the statutory NGA Section 4 "notice" requirement, and its construction of this statutory requirement, as it established the right of a regulated entity to charge rates and to recover costs associated with the complete termination of jurisdictional sales services.[2] That the lower court substituted its judgement of what constitutes adequate statutory notice is without question.[3] Nevertheless, in the absence of a specific finding that FERC's interpretation

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[2] Respondents KP&L and CPUC mistakenly assert that "[w]ithout direct billing, [Transwestern] would have sought to recover these costs prospectively as part of its sales commodity rate to its customers." KP&L/CPUC Brief at 2 (emphasis omitted). This assertion defies logic since the underlying sales services terminated—which is why FERC authorized direct billing in the first instance.

[3] Equally without question is the inconsistency between the lower court's findings on adequacy of notice to Transwestern's customers and its prior findings in *Public Service Co. of New Hampshire v. FERC*, 600 F.2d 944 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979), that the collection of fuel costs "left over" in the wake of transition from one cost recovery formula to another does not violate the "filed rate" doctrine.

of the notice requirement did violence to the statutory scheme, a finding which Transwestern submits is lacking in the lower court's decision, "the principle of deference to administrative interpretations '[must be] followed by this Court whenever decision as to the meaning or reach of a statute [requires] reconciling conflicting policies . . . .'" *Chevron*, 467 U.S. at 844 (citations omitted). Such deference was not accorded FERC by the lower court in the decision below.

B. FERC Does Possess The Statutory Authority To Waive The "Filed Rate" Doctrine

The *Chevron* deference standards also apply to FERC's construction of its waiver authority and, specifically, its authority to waive, *in toto*, the notice requirement "for good cause shown." Again, respondents ignore the unambiguous words of the NGA and baldly assert that FERC's waiver authority—and the breadth of the "good cause" exception—applies only to notice to FERC, *i.e.*, the ministerial filing requirement itself. *See e.g.* KP&L/CPUC Brief at 13-16. As such, respondents assert that, although a rate change in advance of notice to (by the act of filing with) FERC may be permissible, "notice" to the customers is mandatory and non-waivable.[4] Yet, the statute is clear on its face—what is waivable for "good cause" is the "thirty days' notice to the Commission *and to the public*." 15 U.S.C. § 717c(d) (Emphasis added). And, while good cause for waiver of the *FERC* notice/filing requirement has been found where there has been agreement between the contracting parties, *see City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979), nothing in the statute or case law supports the anomalous proposition that, *ipso facto*, there can

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[4] Respondents allege that the decision below comports with the Court's holding in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). *See* PGC Brief at 6 and KP&L/CPUC Brief, *passim*. In fact, however, on the very waiver argument presented here, the Court left open the issue of whether the "good cause" exception could permit retroactive collection of an unfiled rate. 453 U.S. at 578, n.8.

never be waiver of the notice-to-the-customer requirement, for good cause shown.

C. The *Maislin* Decision Did Not Eliminate FERC's Statutory Waiver Authority Under The NGA

Maislin does not, as respondents suggest, eliminate FERC's statutory waiver authority under NGA Section 4(d). *See* KP&L/CPUC Brief at 13-16. In fact, the Court explicitly declined to "express [any] view today on the validity of [the Interstate Commerce Commission's interpretation of its waiver authority under the Interstate Commerce Act]." *Maislin*, 110 S. Ct. at 2770 n. 14. Rather, *Maislin* merely provides that rates privately negotiated between parties cannot be implemented unless filed with the ICC. In contrast, in the agency orders under review below, FERC permitted Transwestern—as a condition to other NGA authorizations—to make subsequent NGA Section 4 filings to recover (or refund, as appropriate) any amounts remaining in Account No. 191 upon the termination of the underlying sales services.[5] And, in this context, FERC concluded that ample notice of deferred purchased gas cost responsibility was provided through the PGA regulations as well as the surcharge recovery provisions of Transwestern's tariff, and that good cause existed for a waiver of the notice requirements to the extent such waiver was necessary. *See Transwestern*, 44 F.E.R.C. at 61,537, App. 113a. Accordingly, *Maislin* provides no support for respondents' assertions regarding "filed rate" impediments to the direct bill procedure.

D. The Lower Court's Decision Conflicts With The Requirements Of The NGPA

Respondents concede the applicability of the NGPA but attempt to refute—by overstating—Transwestern's argument concerning the "guaranteed passthrough" pro-

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[5] These filings were, of course, noticed and subsequently accepted, subject to refund, in accordance with the requirements of Section 4 of the NGA. *See Transwestern Pipeline Co.*, 49 F.E.R.C. ¶ 61,436 (1989) and 50 F.E.R.C. ¶ 61,427 (1990).

visions of Title VI of the NGPA (specifically Section 601, 15 U.S.C. § 3431).[6] *See e.g.* KP&L/CPUC Brief at 16-18. By expounding on the proposition that gas cost recovery is not subject to absolute, unqualified guarantees—which no one disagrees with—respondents have resorted to classic "straw-man" tactics which, stated politely, miss the mark.

Transwestern has never claimed an unfettered, non-reviewable right to recovery of gas costs. Indeed, FERC's orders under review below only permitted Transwestern to make subsequent NGA Section 4 filings to collect these gas costs. The filings themselves were accepted by FERC, but suspended, to provide parties the right to challenge cost recovery under the applicable standards of the NGA and NGPA—a point respondents ignore.

What respondents also refuse to acknowledge is that the lower court's "filed rate" findings may result in denying Transwestern the right to recover certain gas costs. Under the court's rationale, nothing Transwestern can do today can cure the alleged "notice" deficiency. Thus, the lower court's decision contravenes both the constitutional and NGA/NGPA protections designed to ensure that regulated gas companies are provided a meaningful opportunity to be recompensed in the provision of reliable and continuing services. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 791-93 (1968); *see also Associated Gas Distributors v. FERC*, 810 F.2d 226, 233 (D.C. Cir. 1987).

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[6] NGPA Section 601 provides in pertinent part, that

> the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if, under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act, except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

15 U.S.C. § 3431(c)(2).

E. The Lower Court's Decision Conflicts With Decisions Of Other Circuits

The inflexible and unnecessarily circumspect "filed rate"/notice analysis applied by the lower court cannot be squared with decisions from other circuits which have considered and rejected similar "filed rate" doctrine attacks on FERC orders. *See Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied sub nom. Associated Gas Distributors v. FERC*, 476 U.S. 1114 (1986) and *Phillips Petroleum Co. v. FERC*, 902 F.2d 795 (10th Cir. 1990).[7]

An even more overt conflict exists with respect to the breadth of the Commission's waiver authority under Section 4(d) of the NGA. In this regard, the lower court did not follow its own precedent—and precedents from other circuits—to the extent that its narrow waiver analysis refused to recognize the agreement between Transwestern and its customers, as memorialized in Transwestern's service agreements with its customers (which incorporated all provisions of Transwestern's FERC-approved tariff), permitting recovery of all purchased gas costs (including recovery of unrecovered gas costs through the surcharge provisions). Transwestern's former sales customers agreed to the provisions of Transwestern's PGA mechanism. As such, the PGA clause represents nothing more or less than an agreement which, subject only to the NGPA Title VI requirements, commits Transwestern's customers to reimburse the pipeline for gas costs prudently incurred on their behalf.[8]

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[7] In this regard, the lower court's "filed rate" doctrine analysis conflicts with precedent from the D.C. Circuit. *See Public Service Co. of New Hampshire v. FERC*, 600 F.2d 944 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979).

[8] Indeed, the lower court implicitly referenced this agreement, and the obligations imposed thereunder, when it rejected the downstream purchasers' broad attack on the direct bill mechanism (and, specifically, the prospect of Southern California Gas Company being assessed either the whole, or only a part of the Account No. 191 balance) by stating:

The lower court's failure, to permit waiver (to the extent required) of the "filed rate" doctrine based upon prior agreement of the parties stands in conflict with case law from the D.C. Circuit and from decisions of the Fifth and First Circuits, as well. *See City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979); *see also Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983); *Towns of Concord and Wellesley v. FERC*, 844 F.2d 891, 896-97 (1st Cir. 1988).

F. The Court's Decision In *AGD II* Is Not Dispositive Here

Both briefs in opposition agree that "material differences" between the instant facts and the facts raised by FERC in its certiorari petition, filed June 21, 1990, in *FERC v. Associated Gas Distributors*, Case No. 89-2016 seeking review of the D.C. Circuit's decision in *Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), *cert. denied*, 59 U.S.L.W. 3277 (U.S. Oct. 9, 1990) (No. 89-2016) ("*AGD II*"), require that Transwestern's certiorari petition be considered on its own merits and independently from the decision in *AGD II*.[9]

The instant case stands in stark contrast to the facts and issues presented in *AGD II* in at least two critical respects. First, there exists no genuine element of retroactivity in the billing procedure under review here. That is, the "past purchase deficiency" methodology—*i.e.* the centerpiece of the *AGD II* appeals—was not at issue in

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> [i]n any event, the first of the options (SoCal bearing the whole charge if it continued to take sales service) was no more than what would have happened under the existing PGA regulations, before the new Transwestern filing, under the same circumstances.

Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 579 (D.C. Cir. 1990), App. 18a.

[9] As stated by PGC, "there is nothing in the grounds asserted for review of [*AGD II*] to suggest that any foreseeable disposition of that case would affect the holding of the court of appeals in this case." PGC Brief at 10.

this case.[10] Second, the costs at issue in the two proceedings are wholly dissimilar. Unlike *AGD II*, the instant appeal deals strictly with Transwestern's right to collect gas costs which, as the lower court acknowledged, would have otherwise been recoverable but for the termination of Transwestern's jurisdictional sales services and related PGA tariff provisions, and the implementation, in lieu thereof, of the direct bill procedure for the recovery of all remaining purchased gas costs. *See Transwestern*, 897 F.2d at 579, App. 18a.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the petition for certiorari in No. 90-344.

Respectfully submitted,

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[10] Indeed, nowhere in the opinion below did the court find that the direct bill mechanism (which allocated costs on the basis of contract demand levels) violated the retroactive ratemaking prohibition. And, although the "filed rate" and "retroactive ratemaking" concepts do involve similar considerations—and very often overlap—there are distinctions, apparently recognized by the court below and more directly acknowledged in Judge Williams' concurring opinion denying rehearing and rehearing *en banc* in *Associated Gas Distributors v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990). Indeed, while the true-up mechanism inherent in PGA surcharges may operate to effect a collection of past costs, so long as the right to recover such costs (*i.e.* surcharges) is on file with FERC, then no unlawful collection can be found.